NO. 47402-6-II

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY SUPERIOR COURT NO. 13-2-00572-1

PARKER ESTATES HOMEOWNERS ASSOCIATION
A Washington non-profit corporation,
Appellant,

v.

WILLIAM PATTISON/LESLEY PATTISON,
Respondents,

v.

BLUESTONE &HOCKLEY REALTY, INC.
dba BLUESTONE & HOCKLEY REAL ESTATE SERVICES,
Appellant.

BRIEF OF RESPONDENTS

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I. Introduction.

The issue presented is whether a board which is not properly constituted in compliance with its governing documents and state law may exercise the authority of the board.

II. Statement of the Case.

A. CC&Rs For Parker Estates

On October 27, 1994, the Parker Estates Subdivision located in Clark County, Washington was established and a 195-lot Plat recorded with the County Auditor's Office in Book J, Page 62 of Plats. (CP 27-33). Concurrently with the recording of the Plat, the developer recorded a set of Covenant, Conditions and Restrictions (CC&Rs) affecting the subdivision under Clark County Auditor's number 9410270340. (CP 34-97). The CC&Rs did not contain any affirmative covenant requiring a lot owner in the Plat to contribute or pay a share of the neighborhood's maintenance expenses, nor did the CC&Rs establish the ability to file a lien against a lot owner's property for unpaid expenses or assessments for maintenance. By its own terms, amendments to the CC&Rs are only allowed by an instrument signed by Sixty-Five Percent (65%) of the total lots within the subdivision, which equates to One Hundred Twenty-Seven (127) lots (65% of 195). (CP 41).

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B. Bylaws For Parker Estates

Approximately two (2) weeks prior to recording the Plat and CC&Rs, the developer recorded a document entitled, "Bylaws Parker Estate Homeowner Association" with the Auditor's office under Auditor's number 9410070220. (CP 98-107). In addition to addressing administrative aspects of operating a non-profit homeowner's association, the Bylaws also contained both negative and affirmative covenants affecting the lots of the subdivision. In particular, this document established the Parker Estate Homeowner Association ("PEHA") for the "administration of common areas, open space areas and the wall that runs along Parker Road, and if any or if necessary, for roadways, easements, utilities and improvements or activities as the association chooses to undertake from time to time." (CP 98). The document also authorized PEHA to assess property owners within the subdivision for the cost of, among other things, the construction, maintenance and repair of common areas, and established lien rights against the property owner's property in the amount of the assessment. (CP 102).

C. Officer Positions Created By The Bylaws and Elections

To carry out the Bylaws, PEHA created four officer positions (President, Vice-President, Secretary and Treasurer) with defined

administrative duties. (CP 99-100). The Bylaws do not authorize the officers to establish the amount of, levy and collect assessments against property owners. That power was maintained by the association and membership as a whole. (CP 102).

The Bylaws set a one (1) year term for each officer or until such time a successor was elected. (CP 100). Elections of the officers are mandated to be by majority vote at a meeting of the membership (i.e. lot owners), so long as a majority of the membership is present or represented at the meeting by proxy. (CP 100). Any action/meeting of PEHA which fails to have a majority of the membership represented is invalid. (CP 100) The PEHA Bylaws authorize one membership interest per lot. There are One Hundred Ninety-Five (195) lots within the subdivision, which equates to One Hundred Ninety-Five (195) membership interests. For a PEHA election to be valid, the minimum number of members required to be present or represented by proxy to establish a quorum and comprise a majority is Ninety-Eight (98) (50.2 %).

D. <u>The 1998 Amendment To The Bylaws Was Invalid</u>

The trial court did not rule on the 1998 Amendment yet; it was raised by Appellants in their brief, and thus will be addressed (RP 65-72). In 1998 an attempted Amendment to the Bylaws was recorded which

purportedly tried to establish a seven (7) member board of directors for the association to manage the affairs of PEHA. (CP 108-109). However, as evidenced by the contents of the recorded Amendment, the number of votes cast for or against the Amendment was Seventy-Three (73), which was Fifty-Four (54) short of the One Hundred Twenty-Seven (127) needed to satisfy the quorum requirement of the Bylaws. (CP 108). As such, the Amendment was clearly invalid under the governing documents of PEHA. Regardless, the Trial Court did not reach this issue to issue its ruling (CP 362-366 and RP 65-72).

E. Lack Of Quorum And Required Votes

It is undisputed that at least since 2006 no quorum has ever been achieved by the association for the purpose of electing any officers (or board members), nor has a quorum been present/represented at any annual membership since at least 2006. No minutes are available prior to 2005. (CP 111-117 and RP 67, ll. 17-20 and RP 69, ll. 1-12).

F. "Volunteer" Officers And Directors

It is undisputed by all the parties that a steady stream of individuals have rotated in and out as directors and officers of PEHA without being properly elected by the membership. Appellants admit that the board is

made up of "volunteers," none of which have been elected. (RP 38, ll. 23-25, RP 69, ll. 8-25).

G. Brief History Of Pattison Lot

Respondents William W. & Lesley J. Pattison purchased 3219 NW Ogden Street, Camas, WA, 98607, within PEHA on August 24, 2009. (CP 21, ll. 3-4). HOA dues were prepaid by the previous owners to May 31, 2010, and pro-rated from Pattison's escrow funds. (CP 21, ll. 5-6). Pattison did not receive any further communication from the HOA until they received a demand notice from Bluestone & Hockley (hereinafter "Bluestone") sometime in December 2010 (CP 21, ll. 7-9). Pattison disputed the fines on lack of notice and asked for verification of the demand's authenticity from Bluestone. (CP 21, ll. 17-26). Additional fines by the HOA and disputes by Pattison ensued. (CP 21, ll.16-28).

The HOA lien was placed on Pattison's house and a lawsuit was later filed in the name of PEHA against Pattison. (CP 1-4 and CP 22, ll. 5-7).

On July 29, 2013, Pattison filed an Answer, Counterclaim and a Third-Party Complaint (CP 5-10). The Third-Party Complaint was against Bluestone. (*Id.*) Both Appellants filed Answers to Pattison's Counterclaims. (CP 11-19).

Pattison filed a Motion for Summary Judgment on August 20, 2014. (CP 138-140). On or about September 30, 2014, PEHA and Bluestone jointly filed a Motion for Summary Judgment against Pattison. (CP 207-217). Bluestone actively participated in this Motion, argued, and submitted an Affidavit of Kane Thomas in support of its Motion. (CP 218-246, RP 56-63, RP 87, ll. 10- 89, ll. 7). Bluestone also filed a brief in opposition to Pattison's Cross-Motion for Summary Judgment against Bluestone on or about October 16, 2014. (CP 259-267).

The Trial Court granted Pattison's Motion for Summary Judgment and Plaintiff and Third-Party Defendant appealed.

III. Argument.

A. The Actions by a board which was not properly elected are nonbinding and ineffectual against members of the PEHA

The governing legal principle regarding the relationship between homeowner's associations and its members is that an association must comply with its governing documents (i.e. Bylaws, CC&Rs etc.) and state law, and the failure to do so renders actions by the association or its committees invalid. *Hartstene Pointe Maintenance Ass'n v. Diehl,* 95 Wn.App. 339, 345, 979 P.2d 854 (1999). *Hartstene Pointe* makes it clear that actions taken by a board of directors are invalid if the directors and/or

officers are not properly installed and in compliance with an association's governing documents and state law.

In *Hartstene Pointe Maintenance Ass'n v. Diehl,* a homeowner's association sued a homeowner who cut down trees, alleging that the homeowner acted without approval of the association's architectural committee. *Hartstene Pointe,* 95 Wn.App. at 341. In that case, the enforcement of the CC&Rs was given to an architectural control committee appointed by the association's board of directors. The homeowner submitted an application to the committee to remove trees from his property. The committee gave conditional approval to cut trees, limiting the homeowner's ability to remove a particular tree of a certain size. The homeowner removed the tree anyway and the association subsequently issued fines against the homeowner and sued to enforce the fines and other penalties. *Id.* at 341-42.

On appeal, the homeowner argued that the committee's actions were invalid because the committee was not properly constituted under the governing documents of the association; and that the express language of the CC&Rs limited the architectural committee to three (3) members, but the association decided to appoint five (5) members to the committee. *Id.* at 343. The Court of Appeals held that allowing the association to deviate

from the CC&Rs by appointing five (5) members would render the CC&Rs meaningless. *Id.* The Court of Appeals also explained the consequence of the association's failure to comply with its governing documents:

> . . . Diehl does not contend that the HPMA lacked authority to regulate the architectural development of the community. Rather, he argues only that the way in which such control was exercised in his case did not conform with the governing documents of the corporation. This is not a challenge to the authority of the corporation, but only to the method of exercising it. And to hold that such a challenge is barred by ultra vires would be to hold the regularly adopted corporate procedures a nullity. If, as HPMA suggests, RCW 24.03.040 prevents Diehl's challenge, the corporation would be free to disregard its own Bylaws that prescribe the make-up of committees. In short, the corporate articles and Bylaws would be largely meaningless.
>
> *Id.* at 345

The case at bar is analogous to *Hartstene Pointe.* Here, the PEHA Bylaws only allowed for the appointment of four (4) officers to handle the administration of the association. The subsequent attempted amendment establishing a "board of directors" was not authorized by the original Bylaws and not properly voted on by the membership, even if that amendment could have superseded the original Bylaws if properly enacted. Like *Hartstene Pointe,* Pattison is not challenging PEHA's authority to assess property owners under the Bylaws, but the manner in

which its officers and board members have been and are being elected and installed, so as to make any actions taken invalid for want of proper authorization.

Under *Hartstene Pointe,* PEHA was bound to follow the express term of its Bylaws which specifically set forth the association's governance and how officers are to be elected. A key provision of the Bylaws mandate that elections of officers are only valid if a "majority of the total membership" is present or represented by proxy. This never occurred and all actions by the board are invalid under Washington law.

Meeting minutes since 2006, clearly reflect that no quorums were ever in place for any membership meetings or for any elections of officers or directors. Like *Hartstene Pointe* where the formation of an association architectural committee was improper and actions invalid, so too was the formation of the PEHA board of directors and its actions.

Even if the Amendment to the Bylaws establishing the board of directors was valid, since at least 2005 the association has been unable to establish a quorum at any general membership meeting or election meeting to hold any valid election of officers and directors.

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B. <u>The terms of Officers and Directors end upon resignation and/or not being properly reelected according to Bylaws</u>

A non-profit corporation that fails to comply with its Bylaws and properly elect corporate governance cannot keep original officers and directors elected in office indefinitely. *King County Dept. of Community and Human Services v. Northwest Defenders Ass'n*, 118 Wn.App. 117, 125, 75 P.3d 583 (2003).

In *King County Dept. of Community and Human Services* at 125, the Court held that failure of a non-profit corporation to comply with its Bylaws and properly elect corporate governance cannot keep original officers and directors elected in office indefinitely.

> The general rule is that statutes, charters or bylaws providing that an officer or director will serve until a successor is chosen do not preclude resignation, nor do they operate to continue that officer, director in office until a successor has been chosen.
>
> *King County Dept. of Community and Human Services* at 125, citing *Koven v. Saberdyne Systems, Inc.*, 128 Ariz. 318, 322, 625 P.2d 907, 911 (1980).

It is clear from the decision in *King County Dept. of Community and Human Services* that officers and directors of a non-profit corporation cannot move in and out of positions on a board of directors without being properly voted in by the association as a whole. In this case, the PEHA

Bylaws are specific that, "officers shall hold office for a term of one year from the date of election, or until a respective successor of each officer is elected." However, pursuant to *King County Dept. of Community and Human Services,* this does not mean any officer or director who was properly elected remains an officer/director indefinitely when his term expires or he resigns, and it certainly doesn't mean that officers and directors not properly elected somehow gain authority the longer they serve in pseudo capacity.

PEHA's meeting minutes provided from 2006 forward conclusively establish that officers and directors were not properly elected and/or installed. Based on these poor member meeting attendance totals, it is highly unlikely a membership quorum was ever obtained prior to 2006. Further, between May 30, 1997 and March 13, 2006, PEHA was an inactive corporation, and, despite Appellants' objection, there is no credible evidence that a quorum was obtained in 2006. Even if any officers or directors were properly installed prior to 2005, their terms would have expired upon resignation. Without properly electing and installing subsequent successors, the board had no authority to act on behalf of the association. As the meeting minutes indicate, since 2005, a quorum of the membership has never been obtained. During this time

officers/directors have maintained their positions for longer than the one (1) year limit without being re-elected by the membership. Numerous directors have come and gone with individuals replacing them without being voted in by the membership. Thus, not only were they never elected, they were not even completing an unexpired term, nor was there any indication of any voting for anything by anyone at any of meetings. There is a difference between having a quorum and having an election, a distinction which is lost on Bluestone and PEHA.

The current slate of officers has been in place for more than five (5) years without a proper vote. This has resulted in a pseudo board of directors acting on behalf of the association without authority. As such, all actions taken by this board over the years, including the levying of assessments, are invalid.

C. PEHA cannot act to take Pattison's property because it has no valid board.

Appellants continue to argue that PEHA should be allowed to impose assessments, record liens and foreclose liens through Washington's courts without adherence to corporate formalities simply because, as a practical matter, they allege, that this is the way many homeowners associations work. That is not the law in Washington and

that is not the law in this case. PEHA certainly has the authority to impose assessments and record liens, but PEHA must act through its duly elected/authorized officers and/or directors or by direct action of the membership. *PEHA Bylaws*; *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn.App. 339, 345, 979 P.2d 854 (1999).

Election of officers must be consistent with the statutes governing Homeowners Associations, Nonprofit Corporations, and the entity's own bylaws.

> . . . [D]irectors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or the bylaws. Directors may be divided into classes and the terms of office and manner of election or appointment need not be uniform. Each director shall hold office for the term for which the director is elected or appointed and until the director's successor shall have been selected and qualified.
>
> RCW 24.03.100.

PEHA does not and has not had a board that satisfies the requirements of its own Bylaws, nor has the membership taken action to support the assessments, late fees, and penalties at issue in this case. The assessments and liens and this lawsuit have all been established, assessed, imposed and pursued by the PEHA pseudo board, which has no legal authority to act on behalf of PEHA under Washington law. Contrary to Appellants' assertions, Pattison does not challenge the authority of the

corporation, but rather the method of exercising it, as was the case in *Hartstene Point Maintenance Ass'n v. Diehl*, 95 Wn.App. 339, 979 P.2d 854 (1999). Furthermore, the Trial Court recognized Pattison's position in its ruling (RP 69, ll.5-20).

D. PEHA can continue to act as a voluntary association or follow the law.

Appellants' argument that since other property owners pay their assessments, then Pattison should too, continues to fall flat. With Pattison as a prime example, the reason these property owners continue to pay is the fear of the liens, penalties, and legal costs imposed by Appellants for non-payment. It is simply too expensive for the average homeowner to seek legal redress. PEHA can either legitimize its activities by adherence to corporate formalities, or it can carry on acting on a voluntary basis with volunteer, un-elected board members and voluntary assessments. It may not, however, ignore corporate formalities and resort to Washington's courts to enforce voluntary assessments.

E. The 1998 Amendment is invalid, and even if it were valid it does not change the election process.

The PEHA Bylaws, Sections 3.4 and 3.5 set forth the manner of electing association officers (CP 70-71). Note, Washington law provides:

> Unless provided for in the governing documents, the bylaws of the association shall provide for: (1) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the board of directors and officers and filling vacancies; (2) Election by the board of directors of the officers of the association as the bylaws specify; . . .
>
> RCW 64.38.030.

Provisions 3.4 and 3.5 in the Bylaws set forth that officers shall hold office, "for a term of one (1) year from the date of the election, or until the respective successor of each officer is **elected**." (CP 71). The Bylaws further set forth that elections shall be by majority vote and that no meeting of the membership shall be valid unless a majority of the membership is represented. *Id.*

Therefore, even if the Court had found that the 1998 Bylaw Amendment was valid, and Pattison maintains that it is not valid, that Amendment does nothing to amend the requirement for election of association officers under PEHA's Bylaws. Furthermore, Washington law provides as follows:

> The board of directors **shall not** act on behalf of the association to amend the articles of incorporation, to take any action that requires the vote or approval of the owners, to terminate the association, to elect members of the board of directors, or to determine the qualifications, powers, and duties, or terms of office of members of the board of directors; but the board of directors may fill vacancies in its membership of the unexpired portion of any term.

RCW 64.38.025(2) (emphasis added)

By Appellants' own admission, the PEHA pseudo board is simply a group of ad-hoc volunteers, and, as such, have never been duly elected by the membership. Therefore, it is admitted by all parties that no quorum has ever been achieved, and no board properly elected by the membership as required by the PEHA bylaws. Volunteers have no legal standing within PEHA bylaws or within Washington law when selecting HOA officers except when filling an existing elected vacant term. This is both the letter and spirit of Washington HOA law.

F. The 1998 Amendment was void from its inception and therefore a defense challenging the 1998 Amendment is not time barred.

"A statute of limitation, in effect, deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim." *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wash.2d 710, 714, 709 P.2d 793, 795 (1985) (emphasis added). "Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims." *Id.* (emphasis added). However, the statute of limitations never runs against a defense

arising out of the transaction sued upon by the plaintiff. *Ennis v. Ring*, 56 Wash.2d 465, 471, 353 P.2d 950, 953 (1959).

Under Washington law, Pattison was entitled to raise any affirmative defense to the claims prosecuted by Plaintiff in this action. No statute of limitations is applicable to the affirmative defense raised by Pattison in the case at bar because 1) the controversy in this case centers on the assessments and late fees imposed by the purported PEHA board starting in 2010 and continuing to the present day; 2) the purported PEHA board's action to amend the Bylaws in 1998, upon which all subsequent actions of the board, including the assessments and late fees at issue in this dispute, is void, inconsequential and of no effect; and 3) Pattison questions the legal validity of the purported PEHA board as an affirmative defense to the board's cause of action to sue for assessments and late fees and for recovery on a lien illegally recorded against Pattison's real property.

The *Club Envy* Court held that," . . . if the amendment was void from its inception because it was not adopted by the association pursuant to this section, then RCW 64.34.264(2)'s time limitation does not apply." *Club Envy of Spokane v. Ridpath Tower Condo Ass'n*, 184 Wn.App. 593, 337 P.3d at 1131-1134 (2014). While the *Club Envy* Court was interpreting a specific limitation in Washington's Condominium Act, the

reasoning and holding in that case is directly analogous to the case at bar. If the 1998 bylaw Amendment was void from its inception, then raising that fact now as a defense to an action for collection of assessments and late fees, and as a defense to a lien wrongly recorded against Pattison's real property, is not time barred by Washington law. Moreover, Pattison's affirmative defense should not be barred by the policy underpinning Washington's statutes of limitations, which affords a Defendant the opportunity to raise all defenses against claims prosecuted by the Plaintiff.

PEHA's authority to act is derived solely from its governing documents and the laws of Washington. A corporation cannot gain formal legitimacy of its actions simply by virtue of the passage of time, and the PEHA pseudo board cannot here sustain an action for payment on assessments, late fees and a lien that are all traced back to the void 1998 Amendment. Pattison's right to challenge the validity of the 1998 Amendment and the legitimacy of the PEHA board is secure under Washington law and should not be disturbed in this case.

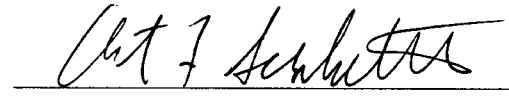
IV. Conclusion.

Actions by a board of directors which is not properly installed in compliance with its governing documents and state law are invalid.

Homeowners associations, generally, are empowered under their governing documents to file liens upon homes, foreclose liens, assess dues and fines, and take other serious actions affecting the lives and property of the homeowners. As such, it is not asking too much that boards follow their governing documents and state law.

Respectfully submitted this19th day of August, 2015.

DUGGAN SCHLOTFELDT & WELCH PLLC



ALBERT F. SCHOTFELDT, WSBA# 19153
Of Attorneys for Respondents

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ALBERT F. SCHLOTFELDT, being first duly sworn upon oath, hereby deposes and says:

1. I am one of Respondents' attorneys, I am competent to testify herein, and I base the following on my own, personal knowledge.

2. On August 19, 2015, I caused true and correct copies of the Brief of Respondents and this Affidavit of Service to be served on the following by depositing in the United States Mail, postage prepaid as shown:

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SUBSCRIBED AND SWORN to before me this 19th day of August, 2015.

JEANETTE P. STROHECKER
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
MAY 15, 2019

Notary Public in and for the State of Washington, residing at Vancouver
Commission expires: 5/15/19